(3)

DOCKET NO. 10-681

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-against-

DONAHUE DEWAR AND SHARON KING,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent DONAHUE DEWAR

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QUESTION PRESENTED

The question presented is whether respondent Dewar's sentence of 240 months imprisonment, upon his convictions for drug trafficking offenses and for a firearms offense under 18 U.S.C. § 924(c), was improper or unjust.

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

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DONAHUE DEWAR AND SHARON KING,

Respondents.

STATEMENT OF THE CASE

Respondents Donahue Dewar ("Dewar") and Sharon King ("King") were indicted for various narcotics-trafficking crimes and for a violation of 18 U.S.C. § 924(c), which prohibits the use or carrying of a firearm during or in relation to, or the possession of a firearm in furtherance of, a drug-trafficking crime or a crime of violence. Following a jury trial, the respondents were convicted of these charges. At sentencing, the district court found that Dewar was subject to a mandatory minimum of 20 years upon the drug-trafficking conviction under 21 U.S.C. § 841(b)(1)(A) and a Sentencing Guidelines range of

240-262 months. (Dewar Sent. Tr. 36). The government sought a consecutive five-year sentence for the conviction under 18 U.S.C. § 924(c), but the district court, applying correctly the law of the Second Circuit at that time, declined to do so. The court sentenced Dewar to 240 months in prison.[1]

All parties appealed. The court of appeals affirmed in the district court in all respects in a Summary Order filed April 29, 2010. Petition for Writ, Appendix A. The respondents petitioned for rehearing but the last of those petitions was denied on August 31, 2010. Petition for Writ, Appendix B. Subsequently, a mandate was issued by the court of appeals on December 12, 2010.

After his petition for rehearing was denied, Dewar petitioned this Court for a writ of certiorari under docket number 10-7163. The government waived its right to respond and the Court denied Dewar's petition in an Order dated November 29, 2010.

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[1] Similarly, the district court sentenced King in a separate proceeding to 121 months in prison, upon finding a mandatory minimum of 120 months for the trafficking conviction, but declined to impose a consecutive sentence for the § 924(c) conviction.

Following this Court's decision in Abbott v. United States, 131 S.Ct.18 (2010), the government filed its own petition for a writ of certiorari seeking vacatur of the district court's judgment and a remand for further proceedings in light of Abbott. The Clerk's Office was directed by the Court to request that a response be filed and did so in a letter to Respondents' counsel dated January 3, 2011. This submission constitutes Dewar's response. For the reasons stated below, the government's petition for a writ should be denied.

REASONS FOR DENYING THE PETITION

As it did with Dewar's petition for a writ of certiorari, the Court should likewise deny the government's petition.

1. The Court's decision in Abbott, although at odds with the decisions of the Second Circuit in United States v. Williams, 558 F.3d 166 (2d Cir. 2009) and United States v. Whitley, 529 F.3d 150 (2d Cir.2008), did not explicitly overrule those decisions or address their continuing viability. This Court has, since Abbott, granted the government's petition for a writ of certiorari in United States v. Williams, under docket number 09-466, vacated the judgment in that

case, and remanded it for further proceedings. It is submitted that the Williams case itself is the appropriate vehicle to determine the effect of Abbott v. United States upon the continuing authority of United States v. Williams within the Second Circuit.[2]

2. The present case is not an appropriate vehicle. The decisions in this case in the district court and subsequently in the Court of Appeals rest upon the authority of one case that is final (Whitley) and one case that has been reopened but not reversed (Williams). The Second Circuit, and the district court, should be allowed to evaluate its decisional law in light of Abbott, which it has not yet done, before additional judgments are vacated and the cases remanded.

3. In any event, it is clear that the district court in this case was not constrained by the Whitley and Williams decisions to impose a sentence lower than it thought appropriate. As noted, it determined Dewar's Guidelines range to be 240-262 months. The district court, in addressing one of Dewar's arguments at sentencing, pointedly noted:

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[2] No party petitioned for a writ of certiorari in United States v. Whitley, supra. The judgment in that case thus became final.

> [I]t is my view that a sentence of twenty years or 240 months was or is the appropriate sentence regardless of what the mandatory minimum is; that in light again of this defendant's history and characteristics and the circumstances of this offense, that some very significant punishment needs to be put in place. And, so, whether a ten or a twenty-year mandatory minimum sentence were found, I would have imposed a sentence of 240 months, and I just want that to be clear.

(Dewar Sent. Tr. 50). On appeal, the Second Circuit found that "[t]his lucid statement renders any error harmless," Petition for Writ, Appendix A at 5a (emphasis added).[3] Thus, in no sense did Dewar elude punishment that the district court wished to impose but thought it could not. Rather, the court was clear that it viewed 240 months as the appropriate term of imprisonment and that is precisely the

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[3] The circuit court made this decision despite its recognition that the district court had failed to follow the procedure mandated by 21 U.S.C. § 851(b) with respect to the prior felony information filed in this case, a point raised by Dewar in his appeal and his petition to this Court. If the failure to follow that statute did not prevent the district court from arriving at a proper sentence, the same analysis should be applied to the district court's interpretation of § 924(c) and its adherence to Whitley and Williams in sentencing Dewar. Because the court could have imposed a higher sentence but did not, that interpretation did not prevent it from arriving at what it considered the proper sentence and the judgment should not be disturbed on that basis.

sentence it imposed. As the Second Circuit decided, the district court's statement rendered "any" error harmless because it concluded that no error occurred that caused an unjust sentence. That finding should apply with equal force to any perceived error alleged by the government. The Petition thus presents no new issue of law and no compelling reason to issue a writ of certiorari.

4. Dewar respectfully asks that he be permitted to adopt any arguments submitted by respondent King, to the extent they are applicable to him.

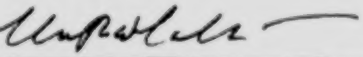
CONCLUSION

Based on the foregoing, this Court should deny the Petition for a Writ of Certiorari.

DATED: White Plains, New York
January 27, 2011

Respectfully submitted,

RESPONDENT DONAHUE DEWAR

BY: 

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